

# PRIVATOPIA<sup>1</sup> IN DISTRESS: THE IMPACT OF THE FORECLOSURE CRISIS ON HOMEOWNERS' ASSOCIATIONS

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## INTRODUCTION

From Orange County, Florida to Orange County, California, homeowners' associations ("HOAs") across America's Sunbelt are struggling due to the nation's recent mortgage crisis and resulting economic recession.<sup>2</sup> As homeowners become unable to meet their financial obligations, HOA assessments are often among the first expenses cut from family budgets.<sup>3</sup> Further, foreclosure rates are hampering the ability of some associations to meet their own financial and contractual obligations.<sup>4</sup> The foreclosure crisis and resulting economic recession has hit Nevada as hard, or harder,<sup>5</sup> than any other state in the country.<sup>6</sup>

Homeowners' associations gained prominence in the United States in the second half of the twentieth century. Today, HOAs represent nearly twenty percent of all homeowners in the United States.<sup>7</sup> In areas such as Las Vegas, Nevada, that have experienced rapid growth in the last couple of decades, this

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<sup>1</sup> EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 12 (1994) (coining the term "privatopia").

<sup>2</sup> See Mike Thomas, *A Simple Plan to Force Upkeep of Foreclosures*, ORLANDO SENTINEL, Nov. 13, 2008, at B1; Jeff Collins, *Home Foreclosures Erode HOA Funds*, ORANGE COUNTY REG. (Cal.), Sept. 28, 2008; see also Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies That Eliminates the Legal Requirements to Privatize New Communities in the United States*, 38 URB. LAW. 859, 859 (2006) (noting prevalence of community associations in Sunbelt states).

<sup>3</sup> Jeff Horseman, *Foreclosures Hitting Homeowners Associations Hard Financially*, PRESS-ENTERPRISE.COM, July 4, 2008, [http://www.pe.com/localnews/sbcounty/stories/PE\\_News\\_Local\\_S\\_1ostfees05.45b204a.html](http://www.pe.com/localnews/sbcounty/stories/PE_News_Local_S_1ostfees05.45b204a.html).

<sup>4</sup> Dennis Wagner, *Skipped Dues Crunch Home Associations*, USA TODAY, May 26, 2008, at 4B, available at [http://www.usatoday.com/money/2008-05-26-condo-fees\\_N.htm](http://www.usatoday.com/money/2008-05-26-condo-fees_N.htm).

<sup>5</sup> See John G. Edwards, *Nevada's Rise in Home Foreclosures Leads Nation*, LAS VEGAS REV.-J., June 15, 2007, at D1, available at <http://www.lvrj.com/business/8014047.html>; Las Vegas Now, *Nevada Leads Nation for 22nd Month in Foreclosures*, Nov. 13, 2008, <http://www.klas-tv.com/Global/story.asp?S=9346248>.

<sup>6</sup> Arguably, the crisis has been just as devastating in Florida, and HOAs in each state face similar challenges.

<sup>7</sup> Wagner, *supra* note 4.

number may be as high as fifty percent.<sup>8</sup> In addition to protecting home values, these associations are often responsible for providing vital services traditionally thought to be the responsibility of municipal governments.<sup>9</sup> Those services are funded through payment of homeowners' assessments or association fees by all homeowners within a community.<sup>10</sup> Thus, the association's ability to provide vital services is threatened when homeowners fail to make assessment payments, or when foreclosed homes sit empty.

Part I of this Note provides an introduction to HOAs, the foreclosure crisis, and the resulting recession that currently threaten many associations' financial stability. Part I begins with a discussion of the rise of common interest communities in the United States, as well as basic association functions. Following this historical introduction is a discussion of the foreclosure crisis and an overview of the severity of this crisis in Nevada.

Part II introduces the problems faced by HOAs across the country because of the foreclosure crisis. These problems fall into two general categories, budget shortfalls and physical deterioration of abandoned properties. In addition to presenting these problems, this section also examines some of the options currently available to HOAs for dealing with these problems.

Part III of this Note examines potential solutions to the problems at the federal, state, and local levels. The section begins with a brief introduction to federal programs aimed at stemming foreclosures and helping the economy recover. Next, Part III looks at legislative changes states can make to help HOAs, and finally how government at the local level might make it easier for associations and individuals to protect the value of their own homes.

Many HOAs currently face unprecedented challenges in meeting budget requirements.<sup>11</sup> This Note does not attempt to provide an empirical analysis of the current problem. Rather, it introduces a widely reported problem, discusses some potential lasting solutions to that problem, and hopefully encourages state and local governments to take action to protect homeowners in good standing from increased assessments or loss of services.

## I. BACKGROUND

Over the last fifty years or so, many areas of the United States have experienced an explosion in the number of HOAs.<sup>12</sup> The current foreclosure crisis now threatens the stability of many of those HOAs.<sup>13</sup> This section provides a look at the forces that led to such rapid HOA growth, followed by an introduc-

<sup>8</sup> *Happy 10th Anniversary: Office of the Ombudsman Fills Need*, LAS VEGAS REV.-J., Aug. 30, 2008, at E1, available at [http://www.lvrj.com/real\\_estate/27694009.html](http://www.lvrj.com/real_estate/27694009.html) [hereinafter *Anniversary*]; see also James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1138 (1998) (HOAs are more prominent in recently developed areas).

<sup>9</sup> Winokur, *supra* note 8, at 1139.

<sup>10</sup> WAYNE S. HYATT & SUSAN F. FRENCH, *COMMUNITY ASSOCIATION LAW: CASES AND MATERIALS ON COMMON INTEREST COMMUNITIES* 362 (1998).

<sup>11</sup> See *supra* text accompanying notes 2-10.

<sup>12</sup> See Community Associations Institute (CAI): Industry Data, <http://www.caionline.org/info/research/pages/default.aspx> (last visited May 22, 2010) [hereinafter CAI Industry Data].

<sup>13</sup> See Part II, *infra*.

tion to HOA operations and a brief examination of the foreclosure crisis both in Nevada and nationwide.<sup>14</sup>

A. *The Rise of Homeowners' Associations in the United States*<sup>15</sup>

During the last half of the twentieth century, the United States experienced a rapid rise in the number of residential communities governed by HOAs.<sup>16</sup> Association-governed communities initially gained popularity in the 1960s as homebuyers, dealing with rising land costs, sought ways to share the costs of private parks and pools.<sup>17</sup> In 1970, there were approximately 10,000 association-governed communities with approximately 2.1 million residents.<sup>18</sup> By 1990, these numbers had risen to 130,000 communities with 29.6 million residents.<sup>19</sup> Today, an estimated 60 million Americans live in over 300,000 association-governed communities in the United States.<sup>20</sup> These communities are especially prevalent in areas that have experienced rapid development in the last few decades.<sup>21</sup>

Analysts and commentators commonly cite two causes as fueling the rapid increase in common-interest communities over the last half century. The first is that the growth in common-interest communities is a market response to consumer desires.<sup>22</sup> While controversial, the idea that the increase in association-governed communities has simply been a market response to consumer demand surely plays at least some role.<sup>23</sup> In this view, consumers make conscious choices to take advantage of the availability of HOAs and association rules designed to protect community aesthetics, and, in turn, maintain property values.<sup>24</sup> Accordingly, developers continue to provide more such neighborhoods to meet that demand.<sup>25</sup> Undoubtedly, some homebuyers do actively seek

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<sup>14</sup> A detailed review of the causes of the foreclosure crisis is beyond the scope of this Note. This Note focuses primarily on the impact that the crisis is having on HOAs without regard for the crisis's underlying causes.

<sup>15</sup> The term "homeowners' association" is commonly used to describe both the common-interest development and the organization or entity charged with the managing common resources and enforcing restrictive covenants. WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW* 13, 29-30 (3d ed. 2000). This Note adopts that dual usage of the term.

<sup>16</sup> See CAI Industry Data, *supra* note 12.

<sup>17</sup> MCKENZIE, *supra* note 1, at 10.

<sup>18</sup> CAI Industry Data, *supra* note 12. These numbers include HOAs, condo associations, and co-ops. HOAs make up just over half of the total. Many of the issues raised by this Note are common to all types of common-interest communities.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1116-17 (2007); see also Siegel, *supra* note 2, at 867.

<sup>22</sup> See Franzese & Siegel, *supra* note 21, at 1112.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See CAI Industry Data, *supra* note 12 (presenting the rapid growth in development of common interest communities).

to purchase homes in association-governed communities,<sup>26</sup> but governmental interference tends to undercut the market theory in many cities.<sup>27</sup> One example of this government interference is when local governments, seeking to gain the benefits of association-governance, limit consumer choice by restricting new developments in a way that effectively mandates community associations.<sup>28</sup>

The second commonly-cited cause is municipal governments' attempts to benefit from HOAs through "load-shedding."<sup>29</sup> Some cash-strapped cities and towns have implemented local zoning and land use regulations that effectively require HOAs for new developments.<sup>30</sup> For example, in Las Vegas, local zoning regulations require developers to provide for landscaping when designing new developments.<sup>31</sup> The city's zoning code further provides that if the landscaped areas are commonly owned, the developer must provide an HOA to maintain the landscaped areas.<sup>32</sup> By requiring HOAs to provide for maintenance of common areas and the provision of traditional municipal services, a municipality can increase its property tax base while passing the accompanying increased cost of providing services or facilities on to the developer and the HOA.<sup>33</sup>

#### B. Introduction to Homeowners' Association Operations

Homeowners' associations increasingly operate in ways that resemble "mini-governments."<sup>34</sup> For example, when a person purchases a home in a new city, the new homeowner is entitled to the benefits of living in that city, including services and facilities provided by the local government. In exchange, homeowners are required to pay property taxes on the home to support the agencies that provide those benefits. Similarly, by purchasing a home in a development governed by an HOA, the homebuyer automatically becomes a member of the association and incurs both the benefits and burdens of that membership.<sup>35</sup>

<sup>26</sup> See Kristin L. Davidson, Note, *Bankruptcy Protection for Community Associations as Debtors*, 20 EMORY BANKR. DEV. J. 583, 584 (2004) (discussing the features that make community associations attractive to homeowners).

<sup>27</sup> Siegel, *supra* note 2, at 889-92 (presenting an illustrative list of local land use codes that effectively mandate community associations for new developments); see also Franzese & Siegel, *supra* note 21, at 1112.

<sup>28</sup> Franzese & Siegel, *supra* note 21, at 1119-20; see also Siegel, *supra* note 2, at 871.

<sup>29</sup> Franzese & Siegel, *supra* note 21, at 1119-20. "Load-shedding" in this context refers to local government's use of HOAs to provide services, such as provision and maintenance of parks and roadways, that local government would provide in the absence of an HOA.

<sup>30</sup> Franzese & Siegel, *supra* note 21, at 1120; see also Siegel, *supra* note 2, at 876.

<sup>31</sup> Evan McKenzie, Private Gated Communities in the American Urban Fabric: Emerging Trends in Their Production, Practices, and Regulation, Presentation at Conference on "Gated Communities: Building Social Division or Safer Communities?" 5-6 (Sept. 18-19, 2003).

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> See, e.g., Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 918 (1976); see also HYATT, *supra* note 15, at 61-62 (discussing the blurring of the public/private distinctions and the Constitutional issues this raises).

<sup>35</sup> Hyatt & Rhoads, *supra* note 34, at 917; Sharon L. Bush, *Beware the Associations: How Homeowners' Associations Control You and Infringe upon Your Inalienable Rights!*, 30 W.

### 1. Benefits

The benefits of membership in an HOA vary by association. Naturally, there are some features that are common to most, if not all, associations. These include traditional amenities like the maintenance and provision of commonly-owned parks, pools, and streets.<sup>36</sup> Homebuyers also benefit in the form of property value protections through the enforcement of covenants, conditions, and restrictions (CC&Rs), which limit how neighbors use their own property.<sup>37</sup> Other examples of benefits include leaf removal, street sweeping, security, and garbage removal.<sup>38</sup> However, these benefits do not come without a cost.

### 2. Assessments

Normally, HOAs fund their operations through the imposition of assessments.<sup>39</sup> An assessment is a “proportionate share of the expenses incurred to fund the association’s business and governmental services.”<sup>40</sup> The association’s CC&Rs, recorded in the community’s declaration and enforceable by the courts, give the association the power to impose these assessments.<sup>41</sup> The requirement to pay assessments is a covenant that runs with the land for all time and, like taxes, payment of assessments is mandatory.<sup>42</sup> Failure to pay may result in the association obtaining a lien on the property.<sup>43</sup>

### 3. Reserve Funds

Another relevant feature of association governance is the maintenance of a reserve fund. Reserve funds are a tool many associations use to prepare for known future expenses,<sup>44</sup> unanticipated expenses,<sup>45</sup> and to potentially cover shortfalls created by unpaid assessments. Although maintenance of a reserve fund is generally left to the business judgment of the association’s governing

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ST. U. L. REV. 1, 4 (2003); *see also* Franzese & Siegel, *supra* note 21, at 1117 (quoting Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 466 (1998)) (comparing assessments to real estate taxes).

<sup>36</sup> Winokur, *supra* note 8, at 1139.

<sup>37</sup> *See* Debora Vrana, *The Runaway Power of Homeowners Associations*, MSN REAL ESTATE, <http://realestate.msn.com/buying/articlenewhome.aspx?cp-documentid=653570> (last visited May 22, 2010); *see also* Steve Thompson, *Buying a Home in a Neighborhood with a Homeowners Association*, ASSOCIATED CONTENT, Oct. 10, 2007, [http://www.associatedcontent.com/article/402258/buying\\_a\\_home\\_in\\_a\\_neighborhood\\_with.html?cat=54](http://www.associatedcontent.com/article/402258/buying_a_home_in_a_neighborhood_with.html?cat=54). Common restrictions include requirements that homeowners maintain their homes and landscaping to a minimum standard, that homeowners seek permission prior to making architectural changes to their homes, and limitations on where homeowners may park.

<sup>38</sup> *See* Winokur, *supra* note 8, at 1139.

<sup>39</sup> *Id.*; Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners’ Associations*, 72 FORDHAM L. REV. 2503, 2509 (2004).

<sup>40</sup> Giantomasi, *supra* note 39, at 2510 (quoting WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 35-36 (1981)).

<sup>41</sup> *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.3 (2000).

<sup>42</sup> Giantomasi, *supra* note 39, at 2509.

<sup>43</sup> *Id.* at 2516.

<sup>44</sup> HYATT, *supra* note 15, at 127. Examples of known future expenses include upgrading and maintaining common areas such as roads, pool, parks, or clubhouses.

<sup>45</sup> *Id.* at 61-62.

board or the association's governing documents, some states require associations to maintain a reserve.<sup>46</sup> Because reserve funds normally accumulate over time, however, newer developments may lack sufficient reserve funds to endure a sustained budget shortage, even in states that require associations to maintain a reserve fund.<sup>47</sup>

Assessment payments are critical to an HOA's operations. When all owners pay their assessments on time, the association is able to operate normally, and all homeowners get the benefits they bargained for when they purchased a home in a common-interest community.<sup>48</sup> As a corollary, when homeowners are unable to pay, or when homes sit empty, HOA budgeting becomes difficult, and the association may be unable to meet expenses and provide agreed-upon services.<sup>49</sup> For these reasons the ability to collect unpaid assessments is critical to the stability of HOAs and, thus, central to this discussion of the problems facing associations today.

### C. *The Nationwide Foreclosure Crisis*

During the first half of this decade, many areas of the United States experienced rapid growth in home values.<sup>50</sup> The proliferation of sub-prime mortgage loans, including adjustable-rate and no-down-payment mortgages, played a significant role in fueling this growth.<sup>51</sup> These mortgages allowed homeowners to qualify for larger loans than may have been available to them under a traditional thirty-year fixed rate mortgage.<sup>52</sup> Such mortgages helped fuel rapid growth in home ownership as well as home values.<sup>53</sup> Unfortunately, as the interest rates on many of these "exotic" mortgages adjusted upward, many homeowners increasingly found themselves unable to meet their monthly mortgage obligations.<sup>54</sup>

<sup>46</sup> *Id.*

<sup>47</sup> Joe Kollin, *Owners Forced to Pay for Others Associations May 'Overassess' by 10 to 20 Percent*, S. FLA. SUN-SENTINEL, June 25, 2008, at 1B; *see also* Jeff Ostrowski, *Foreclosures Force Homeowners Associations to Skimp*, PALM BEACH POST, Apr. 16, 2008, at A1, available at [http://www.palmbeachpost.com/business/content/business/epaper/2008/04/16/mla\\_condos\\_0416.html](http://www.palmbeachpost.com/business/content/business/epaper/2008/04/16/mla_condos_0416.html).

<sup>48</sup> Giantomasi, *supra* note 39, at 2512-13.

<sup>49</sup> *Id.* at 2504.

<sup>50</sup> *See* Press Release, U.S. Census Bureau, *New Census Bureau Data Highlight Changes in Housing Values Through 2005* (Oct. 3, 2006), available at [http://www.wwwcensus.gov.zuom.info/Press-Release/www/releases/archives/american\\_community\\_survey\\_acs/007577.html](http://www.wwwcensus.gov.zuom.info/Press-Release/www/releases/archives/american_community_survey_acs/007577.html).

<sup>51</sup> Noelle Knox, *Some Homeowners Struggle to Keep Up with Adjustable Rates*, USA TODAY, Apr. 3, 2006, at A1, available at [http://www.usatoday.com/money/perfi/housing/2006-04-03-arms-cover-usat\\_x.htm](http://www.usatoday.com/money/perfi/housing/2006-04-03-arms-cover-usat_x.htm); Vikas Bajaj & Ron Nixon, *Variable Loans Help to Put Off Mortgage Pain: Rising Mortgage Payments Bust Tight Budgets, Bankrupt Some*, N. Y. TIMES, July 23, 2006, at 1, available at <http://www.nytimes.com/2006/07/23/business/23mortgage.html>.

<sup>52</sup> Knox, *supra* note 51; Bajaj & Nixon, *supra* note 51.

<sup>53</sup> Bajaj & Nixon, *supra* note 51.

<sup>54</sup> *Id.*; Knox, *supra* note 51; *see also* Hubble Smith, *LV Foreclosures Double: Troubles Expected to Worsen Locally, Nationally as ARMs Reset*, LAS VEGAS REV.-J., Aug. 7, 2008, at 1D, available at <http://www.lvrj.com/business/26371184.html>; Les Christie, *Mesa, Ariz.: Poster Child for Foreclosure*, CNNMoney.com, Feb. 17, 2009, <http://money.cnn.com/2009/>

As an increasing number of homeowners defaulted, foreclosure rates continued to rise above already record levels in some areas.<sup>55</sup> These record foreclosures led to a subsequent decrease in home values.<sup>56</sup> Because many sub-prime loans did not require a substantial down payment, this decrease in home values resulted in many homeowners owing more on their mortgage than their homes are worth.<sup>57</sup> As a result, when banks or lenders foreclose on a property, there is often insufficient equity in the home to satisfy liens held by other creditors, including HOAs.<sup>58</sup>

The foreclosure crisis hit the state of Nevada exceptionally hard.<sup>59</sup> As a state that experienced rapid population growth and residential development over the past decade,<sup>60</sup> Nevada has an especially large number of HOAs.<sup>61</sup> In addition, many of these associations are relatively new, and may not yet have sufficient capital reserve funds to withstand prolonged revenue shortfalls. Finally, rampant speculation and questionable sub-prime lending inflated home values, resulting in median home values nearly doubling between 2001 and 2006.<sup>62</sup> As a result of the foreclosure crisis, those median home values have plummeted by nearly one-third since the 2006 peak,<sup>63</sup> and Nevada has consistently ranked among the top states in foreclosure rates.<sup>64</sup>

The impact of the foreclosure crisis has been wide-ranging. One million families have already lost their homes to foreclosure, economists expect 5.9 million more to do so over the next four years, and consumer bankruptcies have increased by nearly a third.<sup>65</sup> Numerous banks and other financial institutions

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02/17/real\_estate/foreclosure\_poster\_child/?postversion=2009021813 (listing a few types of exotic mortgages and noting that these loans are failing at high rates).

<sup>55</sup> E. Scott Reckard, *U.S. Home Woes Mount*, L.A. TIMES, Sept. 6, 2008, at C4, available at <http://articles.latimes.com/2008/sep/06/business/fi-mortgage6>.

<sup>56</sup> Annette Haddad, *Falling Home Prices Cause Jump in Sales*, L.A. TIMES, Aug. 19, 2008, at A1.

<sup>57</sup> John G. Edwards, *Plan to Help 'Upside-Down' Homeowners Rejected*, LAS VEGAS REV.-J., Dec. 4, 2007, at 1D, available at <http://www.lvrj.com/business/12110681.html>.

<sup>58</sup> James L. Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 358 (1992).

<sup>59</sup> See Las Vegas Now, *supra* note 5; John G. Edwards, *Nevada's Rise in Home Foreclosures Leads Nation*, LAS VEGAS REV.-J., June 15, 2007, at 1D, available at <http://www.lvrj.com/business/8014047.html>.

<sup>60</sup> See Press Release, U.S. Census Bureau, State of Nevada and Atlanta Area Counties Lead in Housing Growth, Census Bureau Reports (July 23, 2004), available at <http://www.census.gov/Press-Release/www/releases/archives/housing/002276.html>; Press Release, U.S. Census Bureau, Nevada Edges Out Arizona as the Fastest-Growing State (Dec. 22, 2005), available at <http://www.census.gov/Press-Release/www/releases/archives/population/006142.html>.

<sup>61</sup> *Anniversary*, *supra* note 8, at 1E.

<sup>62</sup> Jennifer Robison, *Housing Seminar: Las Vegas Real Estate 'Is in the Toilet.'* LAS VEGAS REV.-J., Oct. 24, 2008, at 1D, available at <http://www.lvrj.com/business/33208044.html>.

<sup>63</sup> *Id.*

<sup>64</sup> See Alan Choate, *Vacant Home Yards Prompt Complaints*, LAS VEGAS REV.-J., Jan. 10, 2009, at 2B; Las Vegas Now, *supra* note 5.

<sup>65</sup> Brian Grow, *A Mortgage Rescue Banks Can Love*, BUS. WK., Mar. 2, 2009, at 22; NAT'L ASS'N OF CONSUMER BANKR. ATTORNEYS, NACBA RESPONDS TO GAO STUDY REGARDING HIGHER BANKRUPTCY COSTS, July 30, 2008, [http://www.nacba.org/s/55\\_b19682b8efca766/](http://www.nacba.org/s/55_b19682b8efca766/).

have failed,<sup>66</sup> global credit markets temporarily froze and remain slow,<sup>67</sup> hundreds of thousands of Americans have lost their jobs,<sup>68</sup> and the United States and the rest of the world face a prolonged, and deepening, recession.<sup>69</sup> To combat these effects, Congress has so far approved nearly 1.5 trillion dollars to aid struggling banks and homeowners.<sup>70</sup> While the full extent of the foreclosure crisis and related economic meltdown may remain unknown for quite some time, one thing is becoming clear: the viability of many HOAs is at risk as foreclosed homes sit empty, deteriorating while back assessments pile up due to foreclosure.<sup>71</sup> Part II, *infra*, discusses these problems in more detail.

## II. DEFINING THE PROBLEM

The problems HOAs face because of the foreclosure crisis fall into two related categories. First, delinquent association dues or assessments place a strain on HOA operating budgets.<sup>72</sup> Second, as homes sit empty they often fall into disrepair due to neglect or vandalism.<sup>73</sup> Consequently, other homeowners face potential increased assessments to make up for budget shortfalls along with decreasing property values due to neighborhood deterioration.<sup>74</sup> Part II begins with an introduction to the Uniform Common Interest Ownership Act (“UCIOA”) as applied in Nevada and then describes the budget and property maintenance problems homeowners associations increasingly face.

### A. *The UCIOA in Nevada*

Homeowners’ associations in Nevada are regulated under the UCIOA as adopted by the Nevada legislature and codified in Nevada Revised Statutes (“NRS”) chapter 116.<sup>75</sup> The UCIOA, initially promulgated in 1982, provides a comprehensive scheme for state management of HOAs and other forms of

<sup>66</sup> Edmund L. Andrews, *Fed Rescues AIG With \$85 Billion Loan for 80% Stake*, INT’L HERALD TRIB., Sept. 17, 2008, available at <http://www.iht.com/articles/2008/09/17/business/17insure.php>.

<sup>67</sup> See, e.g., Kevin Carmichael, *Easing the Way*, GLOBE & MAIL (Can.), Mar. 4, 2009, at B2.

<sup>68</sup> See, e.g., David M. Dickson, *Yardsticks Show Deepening Recession*, WASH. TIMES, Dec. 25, 2008, at A08, available at <http://www.washingtontimes.com/news/2008/dec/25/yardsticks-show-deepening-recession/>.

<sup>69</sup> See, e.g., *id.*; Catherine Rampell & Jack Healy, *Fed Chairman Says Recession Will Extend Through the Year*, N.Y. TIMES, Feb. 25, 2009, at B1.

<sup>70</sup> Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765; Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2301, 122 Stat. 2850. American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. (2009) became Pub. L. No. 111-5 on February 17, 2009. See also David Stout, *The Wall Street Bailout Plan, Explained*, WALL STREET J., Sept. 20, 2008, at A32, available at <http://www.nytimes.com/2008/09/21/business/21qanda.html>.

<sup>71</sup> See, e.g., Wagner, *supra* note 4.

<sup>72</sup> *Id.*

<sup>73</sup> *Foreclosures and the Community: Local Governments Struggle to Cope with Abandoned Properties*, SARASOTA HERALD TRIB., Oct. 24, 2008, at A14.

<sup>74</sup> Elizabeth Razzi, *Foreclosures Cost Homeowners Groups*, SEATTLE TIMES, Nov. 16, 2008, at D2.

<sup>75</sup> NEV. REV. STAT. ch. 116 (2007).

common-interest communities.<sup>76</sup> Nevada is one of just seven states to adopt the Act in its entirety.<sup>77</sup> Article 3 of the UCIOA provides some protection for associations when homeowners fail to pay assessments, but that protection may prove inadequate in difficult economic times.<sup>78</sup> This section discusses the Act as adopted by Nevada as a tool to illustrate the problems facing HOAs. Part III of this Note examines the National Conference of Commissioners on Uniform State Laws' ("NCCUSL") proposed 2008 amendments and proposes further amendments to meet the needs of HOAs in the current economic recession and beyond.<sup>79</sup>

The UCIOA is codified in NRS chapter 116.<sup>80</sup> NRS § 116.3116 governs liens imposed against a unit for unpaid assessments.<sup>81</sup> The statute begins by granting the association "a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner from the time . . . the assessment . . . becomes due."<sup>82</sup> This lien has priority over all other liens and encumbrances, except those recorded before the recordation of the association's declaration, "a first security interest on the [property] recorded before the date on which the assessment . . . became delinquent," and real estate taxes or other governmental assessments.<sup>83</sup> Finally, the statute grants "super-priority" for assessments that "would have become due in the absence of acceleration during the six months<sup>84</sup> immediately preceding" foreclosure.<sup>85</sup>

This super-priority provision provides an association with some protection when market forces result in a home's value falling below the amount owed to a first mortgagor.<sup>86</sup> Additionally, the statute provides that any liens in excess of this six-month window are superior to claims by junior mortgagors.<sup>87</sup> While this provision seems to provide associations with additional protection, the reality is that it provides little value in situations where the home is worth less than

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<sup>76</sup> Uniform Law Comm'rs, Fact Sheet: A Few Facts about the Uniform Common Interest Ownership Act, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-ucioa.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucioa.asp) (last visited May 22, 2010).

<sup>77</sup> *Id.* At the time of this writing, the other states to adopt the Act are Alaska, Colorado, Connecticut, Minnesota, Vermont, and West Virginia. *Id.*

<sup>78</sup> *See infra* Part III.

<sup>79</sup> *Id.*

<sup>80</sup> NEV. REV. STAT. ch. 116 (2007). The statute as adopted is slightly less inclusive than the Uniform Act.

<sup>81</sup> NEV. REV. STAT. § 116.3116.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* In its 2009 session, the Nevada Legislature considered, and eventually passed, Assembly Bill 204. The bill as introduced would have extended the super-priority provision of NRS chapter 116 from six months to twenty-four months. *See* Assem. 204, 2009 Leg., 75th Sess. (Nev. 2009) (as introduced). However, the legislature amended the bill prior to passage, shortening the super-priority provision to nine months, and limiting that extension to situations where the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association do not require a shorter period of priority for the lien. *See* Assem. 204 (as enrolled). These changes took effect October 1, 2009.

<sup>85</sup> NEV. REV. STAT. § 116.3116.

<sup>86</sup> Winokur, *supra* note 58, at 382.

<sup>87</sup> *Id.*

the primary mortgage.<sup>88</sup> Despite providing some protections, these UCIOA provisions are insufficient in the face of today's challenges.

### B. Budget Shortfalls

Associations fund their budgets primarily through collection of assessments from the community's homeowners.<sup>89</sup> These assessments, unlike membership fees or dues, represent a share of the common expenses associated with operating the community.<sup>90</sup> When homeowners pay their assessments as scheduled, the association can function and provide required facilities and services.<sup>91</sup> However, collection of these assessments depends on the financial strength of the individual owners as well as overall economic conditions.<sup>92</sup> As a result, with overall foreclosure rates at record highs<sup>93</sup> and the country in recession,<sup>94</sup> HOAs are at great risk of experiencing future revenue shortfalls.

The foreclosure crisis affects HOA budgets in several ways. First, assessments are often among the first expenses struggling homeowners will cut from the family budget.<sup>95</sup> Additionally, once a bank forecloses on a property the bank typically becomes the owner and thus is responsible for payment of assessments.<sup>96</sup> As a result, banks often resist or delay foreclosing on properties to avoid responsibility for assessments.<sup>97</sup> This is particularly significant in a market where homes may sit unsold for a year or more.<sup>98</sup> Finally, even if a bank chooses to foreclose, it may be unwilling to make assessment payments despite its obligation to do so.<sup>99</sup>

Some states have implemented statutory measures to protect HOAs from these effects. For example, states like Nevada that have adopted the UCIOA provide HOAs with a "super-priority" lien granting priority for up to six months of unpaid assessments.<sup>100</sup> However, banks often wait long periods to foreclose on distressed properties to avoid becoming responsible for maintenance of the property.<sup>101</sup> As a result, any delinquent fees in excess of six months may be effectively lost.<sup>102</sup> When banks delay in foreclosing on a property, the association's only recourse is to enforce its own lien through foreclo-

<sup>88</sup> *See id.* at 358-59.

<sup>89</sup> HYATT, *supra* note 15, at 105.

<sup>90</sup> *Id.*

<sup>91</sup> *See* Winokur, *supra* note 8, at 1151-52.

<sup>92</sup> *Id.*

<sup>93</sup> Reckard, *supra* note 55.

<sup>94</sup> *See, e.g.,* Dickson, *supra* note 68; Rampell & Healy, *supra* note 69.

<sup>95</sup> Horseman, *supra* note 3.

<sup>96</sup> Winokur, *supra* note 58, at 360.

<sup>97</sup> Winokur, *supra* note 8, at 1153.

<sup>98</sup> Cyril Moule-Berteaux, *The Housing Crisis Is Over*, WALL ST. J., May 6, 2008, at A23; Brian Wargo, *Silver Lining of Plummeting Home Prices*, IN BUSINESS LAS VEGAS, May 16-22, 2008.

<sup>99</sup> Wagner, *supra* note 4 (Florida HOAs are reporting that some banks are refusing to pay assessments).

<sup>100</sup> NEV. REV. STAT. §116.21183(2) (2007); Uniform Law Comm'rs, *supra* note 76.

<sup>101</sup> Ostrowski, *supra* note 47, at 1A.

<sup>102</sup> Razzi, *supra* note 74, at D2.

sure.<sup>103</sup> This ability to foreclose gives the association some leverage in encouraging the primary lender either to pay the late assessments or foreclose on its own in order to gain control over the foreclosure process. The UCIOA super-priority provision, however, fails to account for attorney's fees and other foreclosure-related costs, which may make foreclosing on its lien economically unattractive for an already cash-strapped HOA.<sup>104</sup>

To illustrate the dilemma HOAs face under the UCIOA, consider the following fictitious example. The Blue Ridge Ranch Homeowners' Association (Blue Ridge) is experiencing a rash of unpaid assessments. Additionally, home prices have fallen dramatically in the past two years, and homes regularly remain on the market for twelve to fifteen months. Of the 1000 homes in the association, 300 are delinquent on their association fee payments, with several at the point where the state statute allows the association to foreclose on its lien. Although fees for these properties average just \$200 per quarter, they add up. Blue Ridge is relatively new and, as such, the association lacks sufficient reserves to operate with a budget shortfall for an extended period of time. If the delinquencies continue, the association will be unable to continue normal operations with only seventy percent of its expected assessment income.

To make matters worse for Blue Ridge, due to market conditions, banks are delaying foreclosure for extended periods. Thus, Blue Ridge has two choices: first, it can simply wait for the bank to foreclose and receive its six months of back fees at that time; or, second, Blue Ridge can exercise its right to foreclose under the state's lien statute. However, because the association only has priority for up to six months of back fees, \$1200 in this case, and the home is likely to be worth less than what is owed to the primary mortgage holder,<sup>105</sup> the costs of foreclosing may preclude lien foreclosure as an alternative for Blue Ridge. The UCIOA and some proposed statutory solutions to this dilemma are discussed further in Part III.

### 1. Current Options

In the absence of further statutory protection, HOAs have limited options remaining to deal with their impending budget shortfalls, none of which are likely to be popular with the association's members. Briefly, the association's options are to increase fees, reduce services, or both. As discussed below, neither fee increases nor service reductions are particularly attractive.

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<sup>103</sup> See, e.g., Shannon Behnken, *Foreclosing Isn't Just for Lenders These Days*, TAMPA TRIB., Dec. 28, 2008, at 1. In response to what some view as overzealous association boards, some states are considering measures limiting associations' ability to foreclose for unpaid fees. For example, Texas is currently considering legislation that would prohibit associations from foreclosing for non-payment of fees. Terrence Stutz, *Texas Amendment Would Prohibit HOA Foreclosures*, DALLAS MORNING NEWS, Feb. 28, 2009, at 3A. In this author's view, this is the wrong approach given the problems HOAs already face and the impact those problems have on members that pay their dues as required.

<sup>104</sup> See Winokur, *supra* note 58, at 359.

<sup>105</sup> See *infra* Part II.A, text accompanying footnote 83 (the first mortgage holder in most cases will be "a first security interest on the [property] recorded before the date on which the assessment became delinquent").

*a. Increase Assessments*

Increasing assessments is likely to be highly unpopular with the association's membership, but it may be necessary for the continued operation of the association.<sup>106</sup> An HOA's governing documents set forth the association's assessment procedures, including the steps the association must take to increase assessments or to impose a special assessment.<sup>107</sup> Despite the unpopularity of such a move, many associations have chosen to meet budget shortages with increased or special assessments. For example, in one association in California, homeowners are facing an 18.5% increase in their annual assessment.<sup>108</sup> Similarly, in a poll of Florida HOAs, nearly two-thirds of associations acknowledged that they would have to raise fees to compensate for lost income due to unpaid assessments.<sup>109</sup> Meanwhile, at one Florida development, homeowners are paying a \$60,000 combined special assessment to cover their budget shortage.<sup>110</sup> Whether through increased fees or one time assessments, even owners who are paying their fees on time should prepare for increased fees and assessments as the foreclosure crisis and deepening recession<sup>111</sup> impact their association's ability to collect fees from their struggling neighbors.<sup>112</sup>

While increasing fees may allow an HOA to continue funding its budget in the short-term, such increases are not without their own problems. Perhaps the most significant problem is that large increases in assessments may create a hardship for homeowners in good standing who previously were able to make their payments.<sup>113</sup> This additional cost to those homeowners could create a domino effect, leading, in turn, to further delinquencies, or even more foreclosures, thus making a bad situation worse.<sup>114</sup> Because of this risk, and because increased or special assessments are generally unpopular, associations often decide to reduce spending instead of increasing assessments.<sup>115</sup>

*b. Reduce Services and Delay Maintenance*

As with government, for HOAs, the alternative to increasing income through taxes (or fees) is a reduction in spending (or services).<sup>116</sup> The services HOAs provide vary greatly in type and significance.<sup>117</sup> While the association

<sup>106</sup> Winokur, *supra* note 8, at 1150.

<sup>107</sup> *See id.* at 1152. Special assessments are one-time fees levied by a homeowners association to cover unexpected expenses. Generally, special assessments are used to cover the cost of major repairs or renovations to common areas, but, as described below, some associations have authorized the use of special assessments to cover budget shortages resulting from unpaid fees. *See, e.g.,* Ostrowski, *supra* note 47; Wagner, *supra* note 4, at 4B.

<sup>108</sup> Wagner, *supra* note 4, at 4B.

<sup>109</sup> *Foreclosures Cause Woes for Property Associations*, HERALD TRIB., Apr. 18, 2008, at D1, available at <http://www.heraldtribune.com/article/20080418/REALESTATE/804180677>.

<sup>110</sup> Ostrowski, *supra* note 47, at 1A.

<sup>111</sup> *See, e.g.,* Dickson, *supra* note 68; Rampell & Healy, *supra* note 69.

<sup>112</sup> *See, e.g.,* Kollin, *supra* note 47; Razzi, *supra* note 74.

<sup>113</sup> Winokur, *supra* note 8, at 1153-54.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1154.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1150.

may be required to provide some services, other, less vital services may be subject to cost cutting.<sup>118</sup> For example, if an association is required to provide trash services or other basic utility services, a contract or municipal regulation might preclude cutting off these services.<sup>119</sup> In turn, an association facing financial difficulty may consider reducing less necessary services as state law and the association's governing documents allow.<sup>120</sup>

Struggling associations seeking to match their budgets to their shrinking assessment base have skimped on everything from heating the hot tub to security patrols.<sup>121</sup> One Florida development has not only cut security patrols, but also sought cheaper insurance premiums and reduced pest control from monthly to quarterly service.<sup>122</sup> Other popular methods for cutting costs are reducing the hours of operation for a community swimming pool and canceling community social events.<sup>123</sup>

Although such cost cutting may allow an HOA to keep assessments at current levels, these cuts are not without a downside. The services provided by an HOA are a principle attraction for many homeowners who decide to purchase a home in an association-governed community.<sup>124</sup> In this case, it is reasonable to assume that some homeowners might prefer an increase in assessments to a loss of the services that attracted them to the community in the first place.

The more troubling issue, however, arises when associations opt to save money by cutting capital reserve funding or delaying maintenance and repairs.<sup>125</sup> While this may help in the short term, if the association elects to defer maintenance for a significant period, it could end up increasing long-term costs as facilities deteriorate more quickly in the absence of regular maintenance.<sup>126</sup> As a result, as the facilities deteriorate, property values in the community are likely to fall.<sup>127</sup> Such neglect will fuel the brutal cycle of decreasing home values, foreclosures, lost assessments, and physical deterioration of neglected community facilities.<sup>128</sup>

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<sup>118</sup> Marcie Geffner, *Condo Foreclosures Hurt Others, Too: Homeowner Associations Suffer When Members Can't Pay Their Dues*, MSNBC.COM, Aug. 29, 2008, <http://www.msnbc.msn.com/id/26097473/>.

<sup>119</sup> *Id.*

<sup>120</sup> *See id.*

<sup>121</sup> Ostrowski, *supra* note 47.

<sup>122</sup> *Id.*

<sup>123</sup> Matt Kempner, *Hard Times Pinch Homeowners Associations*, ATLANTA J.-CONST., June 4, 2008, at 1A.

<sup>124</sup> Thompson, *supra* note 37.

<sup>125</sup> *See, e.g.*, Kempner, *supra* note 123; Jim Wasserman, *Sacramento-area Homeowners Associations Feel Bite of Tough Economy*, SACRAMENTO BEE, July 27, 2008, at D1.

<sup>126</sup> Winokur, *supra* note 8, at 1154.

<sup>127</sup> Shannon Behnken, *Neighbors Are Left with a Mess: Abandoned Houses Hurt Communities' Images*, TAMPA TRIB., June 29, 2008, at 4; *see also* Alan S. Choate, *Foreclosures Aren't Neighborly*, LAS VEGAS REV.-J., October 23, 2008, at 1B.

<sup>128</sup> Winokur, *supra* note 8, at 1154.

### B. *Physical Deterioration of Property*

In addition to budget shortfalls, associations must also address the physical deterioration of foreclosed properties.<sup>129</sup> In a slow economy, a foreclosed property may sit unsold for many months.<sup>130</sup> As these houses remain empty, they often fall into various levels of disrepair, and HOAs, especially those facing budget shortages, may be unable to address the problem.

Physical deterioration of a foreclosed property impacts the neighboring community in at least two important ways. First, it reduces the value of neighboring homes by reducing the appeal of the neighborhood to potential purchasers.<sup>131</sup> Second, abandoned homes may create health and safety concerns: pools become stagnant, pests take over,<sup>132</sup> or the homes become targets for vandalism and squatting.<sup>133</sup> When associations are unable to address these issues, local government may need to provide assistance, especially when the abandoned property creates a public health or safety problem.<sup>134</sup>

#### 1. *Protecting Property Values*

Protection of property value is a key feature, and attraction, of membership in an HOA.<sup>135</sup>

When properties remain abandoned for long periods, the homes are subject to vandalism, yards become severely overgrown, and other issues arise.<sup>136</sup> This deterioration makes the neighborhood less attractive to potential purchasers, thereby reducing home values in the neighborhood.<sup>137</sup> As more homes are abandoned, this effect is multiplied creating a cycle in which foreclosures lead to deterioration of the neighborhood, which leads to further decreases in home values.<sup>138</sup> These lower values in turn lead to more foreclosures as distressed homeowners are unable to sell homes that are worth less than they owe, and the cycle continues.<sup>139</sup>

#### 2. *Health and Safety Issues*

Health and safety issues created by abandoned property are of great concern, not only to neighboring homeowners, but also to the public at large. As such, local government may be willing to come to the aid of an association that

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<sup>129</sup> Maureen Milford, *Foreclosures Become Forgotten Burdens in Neighborhoods*, USA TODAY, June 10, 2008, at 5A.

<sup>130</sup> Moulle-Berteaux, *supra* note 98; Wargo, *supra* note 98.

<sup>131</sup> Choate, *supra* note 127.

<sup>132</sup> Jeff Collins, *Foreclosures Put County's HOAs in Financial Bind*, ORANGE COUNTY REG., Sept. 28, 2008, available at <http://www.ocregister.com/articles/association-19565-hoa-foreclosures.html>; Milford, *supra* note 129.

<sup>133</sup> Milford, *supra* note 129.

<sup>134</sup> See *Foreclosures and the Community*, *supra* note 73 (discussing some attempts by local governments to maintain foreclosed properties).

<sup>135</sup> Thompson, *supra* note 37; Vrana, *supra* note 37.

<sup>136</sup> Collins, *supra* note 132; Milford, *supra* note 129.

<sup>137</sup> Choate, *supra* note 127.

<sup>138</sup> Winokur, *supra* note 58, at 360.

<sup>139</sup> See *supra* Part I.C.

is struggling to remedy health or safety problems.<sup>140</sup> A common example of a health concern created by the foreclosure crisis is the green, mosquito-ridden, stagnant swimming pool.<sup>141</sup> An HOA may lack the funds or permission to drain the pool, but a local government may be willing to step in and drain it to prevent the spread of a mosquito-borne disease such as West Nile virus,<sup>142</sup> or to address the safety risk posed to children by an unattended and potentially unguarded pool. Obviously, this type of intervention is contingent on the ability and willingness of the local government to help.

Absent government intervention, HOAs must find other ways to combat the deterioration of foreclosed homes. Some homeowners have undertaken to protect their home values by organizing neighborhood work parties, or by “adopting” foreclosed homes and performing basic yard maintenance on the properties.<sup>143</sup> Such community action is perhaps the simplest way to address the problem, but is subject to some limitations. The first obvious limitation is that neighbors must be willing to take action and get involved. The second, and perhaps tougher, issue is that such action is, at least technically speaking, trespassing.<sup>144</sup> As a result, these neighbors expose themselves to some level of liability for property damage that may result from their good deeds.<sup>145</sup>

Some HOAs, on the other hand, have the authority to enter properties to resolve violations of the community’s CC&Rs.<sup>146</sup> Unfortunately, action on the part of the HOA may take a long time, and, in the meantime, neighbors are left to watch their neighborhood slowly deteriorate and the values of their own homes fall.<sup>147</sup> If the association lacks authority to enter the property, neighbors must rely on local authorities for help.<sup>148</sup> Part III, below, discusses efforts on the part of local governments to address the physical problems posed by foreclosed homes.<sup>149</sup>

### III. POSSIBLE SOLUTIONS

The United States is in the midst of what may be the worst economic recession ever.<sup>150</sup> This recession, at least in part, is the result of lending practices that led to massive rates of foreclosure, reducing home values and the

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<sup>140</sup> Chris Ayres, *There Goes the Neighbourhood: Bloodsuckers Thrive on Credit Slump*, *TIMES* (London), May 30, 2008, available at <http://www.timesonline.co.uk/toll/news/environment/article4029583.ece>; see also, Tim Gaynor, *Mosquito-Eating Fish Thrive in Foreclosed Pools*, *Reuters*, June 12, 2008, <http://www.reuters.com/article/idUSN1230109120080612> (last visited May 22, 2010).

<sup>141</sup> Ayres, *supra* note 140.

<sup>142</sup> *Id.*

<sup>143</sup> Milford, *supra* note 129.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See *infra* Part III.

<sup>150</sup> See, e.g., Dickson, *supra* note 68; Rampell & Healy, *supra* note 69.

value of investments based on those bad loans.<sup>151</sup> The recession is so intertwined with the foreclosure crisis that any solution to the recession necessarily involves stemming foreclosures and stabilizing home values, which should also help to pull HOAs out of the current crisis.<sup>152</sup> These problems are, however, probably beyond the power of the individual states to resolve.

Even though the broader economic problems may be too large for state governments to handle, there are other things the states can, and should, do. These include passing legislation providing associations with a greater ability to collect past fees, requiring banks to maintain properties once they initiate foreclosure proceedings, or even providing subsidies to associations on the verge of collapse. Local governments can also play a role by providing maintenance assistance or simply passing ordinances allowing neighborhood clean-up committees to enter abandoned properties to conduct maintenance.

The problems facing associations, like those facing the nation, are significant. In light of governments' role at the local level in encouraging, or even mandating HOAs, state and local governments must take some action to protect those homeowners who continue to pay taxes and association fees, while staying current on their mortgage, from a loss of services or drastically increased assessments.

This section begins with an introduction to several federal programs aimed at stemming foreclosure and jump-starting the economy. Next, it discusses ways that states can act to protect struggling homeowners associations. Finally, it provides examples of how local governments around the country are dealing with the physical effects of foreclosure throughout their communities.

#### A. *Federal Solutions to Stem the Foreclosure Crisis and Restart the Struggling Economy*<sup>153</sup>

Federal actions relating to the foreclosure problem fall into two main categories. The first category includes measures aimed directly at stopping foreclosures and providing local governments with aid to combat the effects of mass foreclosures. The second is broader, and focuses on freeing up credit markets, stabilizing the economy, and reducing the length and severity of the current recession. Although the stated purposes of these programs differ, it is unlikely that the any one program can succeed if the others fail.

##### 1. *Measures Aimed at the Foreclosure Crisis*

Two primary federal programs provide support to local communities and struggling homeowners. The first is the Neighborhood Stabilization Program ("NSP"), introduced in the summer of 2008 as Title III of the Housing and

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<sup>151</sup> Jack Healy, *New-Home Construction Hits a Low*, N.Y. TIMES, Feb. 19, 2009, available at <http://www.nytimes.com/2009/02/19/business/economy/19econ.html>; see also Smith, *supra* note 54, at 1D.

<sup>152</sup> See Healy, *supra* note 151; Smith, *supra* note 54, at 1D.

<sup>153</sup> The merits of these government programs are a topic for another Note. The programs are introduced here only as examples of the type of action taken thus far, and to demonstrate the scope of the problem.

Economic Recovery Act of 2008.<sup>154</sup> The second is the Homeowner Affordability and Stability Plan introduced by President Obama in February of 2009.<sup>155</sup> Combined, these plans commit nearly two hundred and seventy-nine billion dollars toward addressing the effects of the foreclosure crisis.<sup>156</sup>

The NSP provides one-time emergency funding to help state and local governments with high foreclosure rates re-develop and rehabilitate “abandoned and foreclosed upon homes and residential properties.”<sup>157</sup> Funds received under the program

may be used to: [1] establish financing mechanisms for purchase and redevelopment of foreclosed upon homes and residential properties . . . ; [2] purchase and rehabilitate homes and residential properties that have been abandoned or foreclosed upon [for purposes of sale or redevelopment]; [3] establish land banks for homes that have been foreclosed upon; [4] demolish blighted structures; and [5] redevelop demolished or vacant properties.<sup>158</sup>

The amount of funding a local government is eligible for is determined based on “the number and percentage of home foreclosures; . . . homes financed by a subprime mortgage related loan . . . ; [and] homes in default or delinquency [in the governmental unit].”<sup>159</sup> Notably, these funds are not available for foreclosure prevention.<sup>160</sup>

In contrast to the NSP, the focus of the Homeowner Affordability and Stability Plan is primarily on individual homeowners, and aims primarily to prevent foreclosures.<sup>161</sup> This plan takes a three-part approach to stabilizing the housing market and reducing foreclosures.<sup>162</sup> The first component of the program seeks to make it possible for some “responsible homeowners” to refinance and take advantage of historically low interest rates, benefiting those who have had the values of their homes drop to a point where they would otherwise be unable to refinance.<sup>163</sup>

The second piece of the plan provides seventy-five billion dollars in assistance to homeowners who are at risk of defaulting on their loans.<sup>164</sup> The plan has the dual goals of keeping people in their homes and protecting neighbor-

<sup>154</sup> Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2301, 122 Stat. 2654, 2850.

<sup>155</sup> See U.S. Dep’t of the Treasury, Homeowner Affordability and Stability Plan Fact Sheet (2009), available at <http://www.treas.gov/initiatives/eesa/homeowner-affordability-plan/FactSheet.pdf>.

<sup>156</sup> See Housing and Economic Recovery Act § 2301; U.S. Dep’t of the Treasury, *supra* note 155, at 8.

<sup>157</sup> Housing and Economic Recovery Act § 2301.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See Using Neighborhood Stabilization Program (NSP) Funds to Serve Persons with Special Needs, [http://www.hudhre.info/documents/NSP\\_factsheet.pdf](http://www.hudhre.info/documents/NSP_factsheet.pdf) (last visited May 22, 2010) (“NSP funds can be used to purchase and rehabilitate abandoned or foreclosed properties, demolish blighted structures, redevelop demolished or vacant properties, and/or offer downpayment and closing cost assistance to eligible households. Grantees can also create ‘land banks’ to assemble, temporarily manage, and dispose of vacant land for the purpose of stabilizing neighborhoods and encouraging redevelopment of urban property.”).

<sup>161</sup> U.S. Dep’t of the Treasury, *supra* note 155, at 1.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

hood home values.<sup>165</sup> To meet these goals, the program provides a subsidy to lenders who agree to modify loans so that a borrower's mortgage payment does not exceed thirty-one percent of his gross income.<sup>166</sup> To make this possible, the lender must agree to reduce the loan to thirty-eight percent of the borrower's gross income, at which point the government will match further reductions up until the loan reaches thirty-one percent.<sup>167</sup> In addition, the program provides an incentive to loan servicing agencies to offset the administrative costs of refinancing.<sup>168</sup> The plan addresses two of the primary hurdles to convincing lenders to modify loans voluntarily by: (1) reducing the risk to the lender, and (2) offsetting administrative costs.<sup>169</sup>

The final piece of the program supports "low mortgage rates by strengthening confidence in Fannie Mae and Freddie Mac."<sup>170</sup> By increasing the Treasury Department's Preferred Stock Purchase Agreements from \$100 billion to \$200 billion, the Obama administration hopes to build confidence and promote stability and liquidity in the mortgage markets.<sup>171</sup>

These programs illustrate the effect the foreclosure crisis has had on the national economy and the amount of effort Congress and the White House are willing to make to address the problem. However, these programs exist in the context of other, larger programs, discussed in the next section, designed to stimulate the overall economy and help the country out of the current recession.

## 2. *Measures Aimed at Stimulating the Economy*

In part as a result of the massive foreclosure crisis, the United States is suffering possibly the worst economic recession since the 1930s.<sup>172</sup> In response to this downturn, Congress has thus far passed two bills, totaling nearly \$1.5 trillion dollars, in the hopes of freeing up credit markets and spurring investment and job growth.<sup>173</sup> The first of these measures is the Emergency Economic Stabilization Act ("EESA").<sup>174</sup> The second is the American Reinvestment and Recovery Act of 2009 ("ARRA").<sup>175</sup>

Congress passed the first of these programs, the EESA, including the Troubled Asset Relief Program ("TARP"), otherwise known as "the bailout" in October 2008.<sup>176</sup> The program, responding to a global economic crisis that made access to credit extraordinarily difficult, authorized the Secretary of the Treasury to spend up to \$700 billion buying and insuring troubled mortgages

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<sup>165</sup> *Id.* at 4.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *See id.*

<sup>170</sup> *Id.* at 7.

<sup>171</sup> *Id.*

<sup>172</sup> *See, e.g.,* John Hilsenrath, Serena Ng & Damian Paletta, *Worst Crisis Since '30s, with No End Yet in Sight*, WALL ST. J., Sept. 18, 2008, at A1.

<sup>173</sup> Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, §§ 2, 115, 122 Stat. 3765; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

<sup>174</sup> Emergency Economic Stabilization Act.

<sup>175</sup> American Recovery and Reinvestment Act.

<sup>176</sup> Emergency Economic Stabilization Act.

and other assets that made it difficult for banks to extend credit.<sup>177</sup> The primary goal of TARP is to increase liquidity, build investor confidence, and ultimately to increase the availability of credit.<sup>178</sup> Unfortunately, after spending nearly half of the \$700 billion allotment, the program has only minimally impacted credit availability as banks have simply hoarded the additional funds,<sup>179</sup> and in some cases may have even used the funds to make large executive bonus payments.<sup>180</sup> Consequently, the White House put the program on hold until February of 2009, when Congress voted to release the second half of the funds.<sup>181</sup> This time the treasury will impose stricter controls on banks that accept TARP money and limit how those banks may use the TARP funds.<sup>182</sup>

The second major program, the ARRA, is a broader measure, combining wide-scale government investment in infrastructure projects with tax cuts designed to spur job growth and pull the economy out of recession.<sup>183</sup> The stated purpose of the Act is to preserve and create jobs, assist those most impacted by the recession, provide incentives to spur technological advances in science and health, invest in infrastructure, and stabilize State and local government budgets.<sup>184</sup> Although the majority of the ARRA does not directly address the foreclosure crisis or the resulting issues facing homeowners, the underlying economic weakness it addresses does threaten to further destabilize HOA budgets and increase foreclosures if the plan fails.

Even though it is not the role of the federal government to protect HOAs from collapse, the above examples demonstrate that actions taken by the federal government do have an impact on the forces that are currently threatening the viability of some associations and placing homeowners at risk. In light of the current economic recession, this type of action may be necessary to prevent even more widespread job losses, resulting foreclosures, and lost association fees.

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<sup>177</sup> Senate Committee on Banking, Housing, and Urban Affairs, Summary of the "Emergency Economic Stabilization Act of 2008," available at [http://banking.senate.gov/public/\\_files/latestversionEESASummary.pdf](http://banking.senate.gov/public/_files/latestversionEESASummary.pdf) (last visited Mar. 8, 2009).

<sup>178</sup> Emergency Economic Stabilization Act § 2; see also Senate Committee on Banking, Housing, and Urban Affairs, *supra* note 177.

<sup>179</sup> See David Goldman, *Senate Vote Fails, Obama Gets \$350B*, CNN MONEY, Jan. 15, 2009, [http://money.cnn.com/2009/01/15/news/economy/senate\\_tarp\\_vote/index.htm](http://money.cnn.com/2009/01/15/news/economy/senate_tarp_vote/index.htm); Mike McIntire, *Bailout Is a Windfall to Banks, if Not to Borrowers*, N.Y. TIMES, Jan. 18, 2009, at A1.

<sup>180</sup> See, e.g., Jay Fitzgerald, *Treasury Gets Tough: Eyes Financial Bailout Abuse*, BOSTON HERALD, January 28, 2009, at 25.

<sup>181</sup> See Goldman, *supra* note 179.

<sup>182</sup> See Press Release, Timothy Geithner, U.S. Treasury Sec'y, Remarks Introducing the Financial Stability Plan (Feb. 10, 2009) (as prepared for delivery), available at <http://www.ustreas.gov/press/releases/tg18.htm>.

<sup>183</sup> See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

<sup>184</sup> *Id.* § 3, 123 Stat. at 115-16.

## B. State Option for Resolving the Budgetary Issue

### 1. Fixing the Uniform Act

As noted above, the UCIOA leaves struggling HOAs without a sufficient remedy for recovering unpaid assessments. The first problem with the uniform rule is that it does not provide super-priority for attorney's fees or other costs associated with collections and foreclosure. As discussed in Part II, the expense of attorney's fees can present a significant barrier to an association exercising its right to foreclose on a property. Because associations that are struggling financially may be unable to justify collection costs, these costs may effectively force the association to rely on the mortgage holder to initiate foreclosure of the property.<sup>185</sup> In its proposed 2008 amendments, NCCUSL addressed this problem.<sup>186</sup> The proposed amendment provides that "reasonable attorney's fees and costs incurred by the association in foreclosing on the association's lien" will be superior to the first security interest or mortgagor.<sup>187</sup>

Under the current version of the law, HOAs are at the mercy of the banks in recovering assessments.<sup>188</sup> This amendment addresses that problem by removing a significant financial barrier to associations enforcing their liens through foreclosure. Although removing this financial barrier might be good for struggling HOAs, banks are almost sure to resist the proposed change.

One problem with the provision is that it could increase the initiation of foreclosure proceedings by HOAs. Providing lien priority for some amount of assessments, when combined with the ability to collect the costs of enforcement, will provide struggling associations with at least some incentive to enforce their liens rather than wait for the bank to do so.<sup>189</sup> However, such a result may be undesirable with foreclosures at record rates and the government searching for ways to keep families in their homes.<sup>190</sup> The legislature should consider other options to protect HOAs against mortgage holders. For example, instead of providing super-priority to attorney's fees and costs associated with foreclosure proceedings, the legislature could grant the association super-priority for all unpaid assessments on condition that the HOA does not foreclose on its own lien.<sup>191</sup> Such a provision provides added protection to HOAs while limiting the added risk of foreclosure to struggling homeowners.

Providing an assessment lien priority over mortgages against the property has some common law support.<sup>192</sup> Courts that have arrived at this conclusion hold that the assessment lien is prior to all interests recorded after the recordation of the association's declaration.<sup>193</sup> These decisions treat the assessment lien as existing from the time of the declaration's recordation rather than the

<sup>185</sup> See Winokur, *supra* note 58, at 359.

<sup>186</sup> Amendments to Uniform Common Interest Ownership Act (2008), available at [http://www.law.upenn.edu/bll/archives/ulc/ucioa/2008am\\_approved.htm](http://www.law.upenn.edu/bll/archives/ulc/ucioa/2008am_approved.htm).

<sup>187</sup> *Id.*

<sup>188</sup> See Winokur, *supra* note 58, at 359.

<sup>189</sup> See *id.* at 358-59.

<sup>190</sup> Reckard, *supra* note 55.

<sup>191</sup> See Winokur, *supra* note 58, at 367-68.

<sup>192</sup> *Id.* at 357-58.

<sup>193</sup> *Id.* at 357 n.16.

time the assessment became past due.<sup>194</sup> In considering this approach, however, the legislature must also consider the needs of lenders who might be unwilling to issue loans in the presence of a prior existing lien of undetermined value.<sup>195</sup>

As Professor James Winokur explains, however, lending institutions also have an interest in the financial strength of associations that govern the properties in which they hold security interests.

[M]ortgage lenders . . . have from the start been crucial to the emergence of [CICs]. On the other hand, the financial strength of an association often bears strongly on the value of the housing units in which both lenders and residents have invested. Indeed, as assessments on some properties in a community become uncollectible, the CIC unit lender is itself damaged by increasing assessments and decreasing values for other properties it may hold as security.<sup>196</sup>

As a result of this relationship, many banks might not be opposed to this rule. In fact, aside from those banks that currently choose to disregard their obligation to pay assessments as the owner of a foreclosed home,<sup>197</sup> the rule would only increase the banks' liability to the extent that they delay foreclosure of the home.

Despite providing banks some added incentive to foreclose, this change should not significantly increase foreclosure rates. When a homeowner defaults on their mortgage, the bank or other mortgage lender must address a multitude of factors in deciding whether to foreclose. First and foremost, the bank must consider the borrower's situation.<sup>198</sup> Often the lender may opt to work with the borrower to keep the borrower in the home and avoid foreclosure through refinancing, or granting the owner a deferment to ride out a temporary hardship.<sup>199</sup> Second, the bank must consider the costs it will incur should it become the owner of the home.<sup>200</sup> These costs include insurance, security, maintenance, landscaping, and property taxes, among others.<sup>201</sup> As a result, the decision to foreclose rests with an experienced bank or lender that will be making that decision after considering many factors, only one of which is the effect of the unpaid assessments for which the bank will eventually be responsible regardless of whether it chooses to foreclose.<sup>202</sup> Conversely, the association's decision to foreclose rests with a board of directors that may have little experience in such matters, and whose primary concern is recovering lost assessments to keep their struggling association afloat.<sup>203</sup>

<sup>194</sup> *Id.*

<sup>195</sup> *See id.* at 359.

<sup>196</sup> *Id.*

<sup>197</sup> CMTY. ASS'N LEADERSHIP LOBBY, 2008 FLORIDA COMMUNITY ASSOCIATION MORTGAGE FORECLOSURE SURVEY 2 (2008), available at [http://www.callbp.com/pubs\\_public.php](http://www.callbp.com/pubs_public.php).

<sup>198</sup> Marni Leff Kottle, *Banks More Than Willing to Help Homeowners Avoid Foreclosures*, S.F. CHRON., Oct. 27, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/10/27/FORECLOSURE.TMP>.

<sup>199</sup> *Id.*

<sup>200</sup> Winokur, *supra* note 58, at 360.

<sup>201</sup> *Id.* at 360-61.

<sup>202</sup> *See id.* at 361.

<sup>203</sup> *See* Winokur, *supra* note 8, at 1143-46 (discussing the politics and limited professional competency of common-interest community boards).

Neither of the above solutions alone can solve the problem, but both provide a way to address shortcomings in the Uniform Act and protect HOAs in the future. However, the threats facing HOAs today are urgent and require more immediate action.

## 2. *Direct Subsidies to HOAs*

In addition to modifying the UCIOA as discussed above, in some cases a state may want to consider providing subsidies to struggling associations.<sup>204</sup> A subsidy could be used to help associations sustain themselves and continue to provide essential services.<sup>205</sup> Then, when the housing market and, in turn, association membership recovers, and the association is able to collect assessments, the subsidies could be refunded through a smaller increase in assessments instead of the large increases that might be required to sustain a community in the face of overwhelming assessment delinquencies.<sup>206</sup>

The federal government has already shown a willingness to subsidize elements of the housing market throughout the foreclosure crisis and ensuing credit meltdown.<sup>207</sup> Through the adoption of three separate bills, Congress has already approved nearly two trillion dollars in aid to struggling banks and, in limited cases, struggling homeowners.<sup>208</sup>

Although these bills passed, many Americans are unhappy that Congress has been approving such large “bail outs.”<sup>209</sup> Even in the face of a deepening recession, many Americans remain opposed to an infusion of money to rescue the banks and irresponsible homebuyers that created the financial meltdown in the first place.<sup>210</sup> Despite this opposition, after rescuing numerous banks and other private companies, it would be irresponsible for Congress and state legislatures to oppose subsidies, such as those proposed here, which aim to protect

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<sup>204</sup> Kollin, *supra* note 47. The struggles facing many states in the current recession may preclude such action in the absence of federal help, but the idea should not be dismissed outright. See, e.g., David Sarasohn, *Stimulus for States: Drowning States Get Lifeline, as GOP Hacks Away*, OREGONIAN (Portland, OR), Feb. 18, 2009, at D4 (noting budget problems facing Oregon, Washington, California, and Kansas); James Salzer, *Revenue Plunge May Deepen Cuts; January Collections Down 14% from Same Month in '08, Increasing Pressure on Budget*, ATLANTA J. CONST., Feb. 7, 2009, at 1A (Georgia is one of at least forty-six states facing a budget shortfall).

<sup>205</sup> Kollin, *supra* note 47.

<sup>206</sup> *Id.*

<sup>207</sup> See generally Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765; Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654; see also Stout, *supra* note 70.

<sup>208</sup> Emergency Economic Stabilization Act of 2008; Housing and Economic Recovery Act of 2008; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115; see also Stout, *supra* note 70.

<sup>209</sup> Rasmussen Reports, *Most Americans Oppose Federal Bailout for Homeowners*, Mar. 27, 2008, [http://www.rasmussenreports.com/public\\_content/business/general\\_business/most\\_americans\\_oppose\\_federal\\_bailout\\_for\\_homeowners](http://www.rasmussenreports.com/public_content/business/general_business/most_americans_oppose_federal_bailout_for_homeowners) (reporting that 61% of respondents were opposed to federal help for banks that made bad loans).

<sup>210</sup> *Id.* (a smaller percentage of Americans were opposed to federal help for homeowners who borrowed more than they could afford, 53%).

homeowners in good standing from further increased assessments and decreased property values resulting from the foreclosure crisis.<sup>211</sup>

Desperate times often call for desperate measures. While the situation for most associations does not appear to have reached the critical stage yet, a prolonged economic recession, like the one the nation currently faces, may lead to bankruptcy for some associations.<sup>212</sup> The federal government has proven willing to help out the most culpable actors in this crisis.<sup>213</sup> If association-managed communities are as important to the modern residential picture as their rapid growth indicates, subsidizing struggling associations may eventually be necessary in some cases.<sup>214</sup>

### B. Local Options for Dealing with the Effects of Abandoned Property

Some local leaders have already begun developing ways to deal with abandoned properties. While these solutions do not specifically apply to homes in common-interest communities, they apply to them insofar as they are a part of the surrounding community. Although local solutions provide the opportunity for creative solutions and community building, cost is an important consideration.<sup>215</sup> As a result, many local governments may limit intervention to situations that pose a health or safety hazard.<sup>216</sup>

In central Florida, cities have taken a variety of approaches to the problem of abandoned homes.<sup>217</sup> While the approaches vary, they have one common bond: the cities want to recover their money.<sup>218</sup> For example, in Oviedo, Florida, if the city mows an overgrown lawn and the owner fails to pay, the city will place a lien on the property.<sup>219</sup> The city provides owners with thirty-days' notice before the city takes action and mows the yard for a fee.<sup>220</sup> In response to doubts about the viability of liens when a home faces foreclosure, Windemere, Florida leaders plan to use tax-assessments rather than liens to recover the costs of maintaining abandoned lawns.<sup>221</sup>

The City of Chula Vista, California has taken a slightly different approach. There, the city is requiring banks to take responsibility for maintenance of a property from the day they file foreclosure papers rather than the time they

<sup>211</sup> The Federal Government has already rescued insurance conglomerate AIG, and the investment bank of Bear Stearns. Andrews, *supra* note 66.

<sup>212</sup> See Wagner, *supra* note 4.

<sup>213</sup> See Andrews, *supra* note 66; Business Wire, *The Blame Game: Congress, Wall Street, Homebuyers, and Big Business Top Americans List for Economic and Financial Crisis*, Oct. 24, 2008, [http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news\\_view&newsId=20081024005060&newsLang=en](http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20081024005060&newsLang=en) (reporting the results of a Harris Poll survey of 2119 U.S. Adults) (emphasis in title added).

<sup>214</sup> See Wagner, *supra* note 4.

<sup>215</sup> See Sandra Pedicini, *Cities Debate Mowing Yards in the Weeds*, ORLANDO SENTINEL, Nov. 11, 2008, at B1; Mike Thomas, *A Simple Plan to Force Upkeep of Foreclosures*, ORLANDO SENTINEL, Nov. 13, 2008 at B1.

<sup>216</sup> See Pedicini, *supra* note 215; Thomas, *supra* note 215.

<sup>217</sup> Pedicini, *supra* note 215.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

legally take ownership.<sup>222</sup> City leaders hope this requirement will protect homes from damage during the six months or more that it can take to foreclose on a property.<sup>223</sup> Rather than performing maintenance, the city issues steep fines that become tax liens in the event the lender does not properly maintain the abandoned property.<sup>224</sup>

As an alternative to government assistance, local governments could modify local trespassing ordinances to allow local neighbors access to foreclosures for purposes of performing maintenance.<sup>225</sup> This option obviously depends on the initiative of the association and its individual members, but removing this hurdle would provide homeowners with another option for protecting their home values, and might have the additional benefit of introducing a greater sense of community into the community association.

### C. Leave HOAs to Sink or Swim

There is of course, no requirement for government at any level to take action to protect HOAs or their members.<sup>226</sup> HOAs exist primarily as a matter of private contract for the benefit of those who live in the association.<sup>227</sup> With many states and cities also struggling to survive during the current recession, the plight of HOAs is likely to take a backseat to other, more public, and more pressing matters.<sup>228</sup> However, considering the strong role that local governments have played in the proliferation of association-governed communities,<sup>229</sup> the better approach is for state, or at least local, governments to take action to prevent failure of these communities.

## V. CONCLUSION

These are difficult times for HOAs, not only in Nevada, but around the nation. HOA-governed communities play a significant role in modern American residential development.<sup>230</sup> With foreclosure rates maintaining record levels,<sup>231</sup> these associations are dealing with shrinking assessment bases and the deterioration of vacant homes.<sup>232</sup> While existing statutes governing HOAs provide some protection, they are insufficient.

Additionally, our country currently faces a historic economic crisis. Governmental leaders must create solutions to the problems that associations face in the current crisis that will ensure the viability of common interest communities, not only in this difficult period, but in the future as well. Municipalities have taken the position of encouraging, or even mandating, associations for

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<sup>222</sup> Thomas, *supra* note 215.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> See *supra* text accompanying notes 144-48.

<sup>226</sup> McKenzie, *supra* note 31, at 4-5.

<sup>227</sup> See *supra* Part I.

<sup>228</sup> See, e.g., Salzer, *supra* note 204; Sarasohn, *supra* note 204.

<sup>229</sup> Siegel, *supra* note 2.

<sup>230</sup> See *supra* Part I.

<sup>231</sup> Reckard, *supra* note 55.

<sup>232</sup> See *supra* Part II.

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new development.<sup>233</sup> These cities have benefited from the increased tax base provided by the developments without incurring the costs of services that associations provide in place of the local government. Thus, government should take action to protect struggling HOAs, and consequently, those homeowners who live in association-governed communities and continue paying their assessments, mortgages, and taxes.

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<sup>233</sup> Franzese & Siegel, *supra* note 21, at 1112; McKenzie, *supra* note 31, at 5-6.

